In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 556

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America, the Secretary of Agriculture and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

In a complaint filed with the Commission on June 24, 1959, the Port of New York Authority and the City of New York attacked as unjust and unreasonable, in violation of Section 1(5) of the Interstate Commerce Act, and unduly prejudicial and preferen-

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tial, in violation of Section 3(1) of the Act, the maintenance by several railroads of certain per-car charges and rates on vegetables and fruits from southern and southwestern territories to stations in New York, N.Y. These charges were alleged to be higher than the corresponding rates and charges to points in New Jersey located within the New York terminal rate group. The rates to the New York and New Jersey points, which were within the same rate group, had been identical, but the challenged New Jersey rates were lowered to enable the railroads to regain traffic from unregulated motor carriers (J.S. 32a).

The hearing examiner concluded that the rates were unlawful, as alleged. A division of the Commission held, however, that the rates were reasonable and not prejudicial, and it dismissed the complaint. The entire Commission, on reconsideration, concluded that the rates were unreasonable and prejudicial. It ordered appellants to discontinue the unlawful rate structure. The three-judge district court affirmed the Commission's order insofar as it was based on the finding of prejudice.

The evidence before the Commission related primarily to the per-car charges on vegetables and on vegetables and fruits in mixed cars from South Florida points to the New York City stations. These per-car charges under the challenged rates are $57 higher to all New York City stations than the corresponding charges to New Jersey points, which are approximately $400 per carload (J.S. 2a). A uniform line-haul rate on long-haul traffic to all points and stations

within the New York rate group had long been maintained by the carriers without regard to any unusual operating conditions at particular stations within the group (J.S. 13a).

Appellants introduced evidence to show a cost differential between the 25 New York and the 100 New Jersey stations. The evidence of higher New York City costs related principally to one New Jersey station and to one station consisting of three New York City piers (J.S. 14a, 34a). The New York station (the "Manhattan piers") had facilities not ordinarily found in a freight station. "The piers are heated to protect the produce during the winter and overhead blowers ventilate the area in warm weather. Auction rooms are lighted, heated, and maintained by the railroads. Floor space is assigned for each car and the contents thereof are sorted and displayed for prospective buyers" (J.S. 33a).

The Commission found that there was a cost differential of $63.25 (J.S. 36a–37a), but it concluded that insofar as this reflected higher "terminal" costs [1] it was not greater than the disparity found among stations in other large rate groups (J.S. 38a). With respect to "station costs," [2] the Commission deter-

[1] The Commission defined "terminal costs" as the "costs incurred between completion of the line-haul rail movement and the placement of cars in a position where they are accessible to consignees" (J.S. 36a).

[2] "Station costs," the Commission noted, include "all costs associated with delivery excluding, of course, the terminal costs noted above and the cost of unloading and sorting at the New York piers, for which service an unloading charge is imposed" (J.S. 37a).

mined that $36.82 were "extraordinary" costs which could be recovered where the special services were offered through accessorial surcharges, which would not upset the basic group rate (J.S. 46a).

The Commission also based its decision on the long tradition of treating northern New Jersey and New York City as a single community with respect to railroad rates. It noted a competitive consideration which it deemed especially important here—the effect of the rate differential on the selection of a new site for the Washington Street Market, which served some 200 wholesalers, jobbers, and brokers of fresh fruits and vegetables, and is now located in Manhattan and served by the Manhattan piers. The Commission found that a change of the market site was probable; that New York City and the communities in northern New Jersey favored by the rate differential were competing for it; that the rate differential was large enough to influence the decision as to the relocation; and that the decision as to relocation, when made, should not be affected by a differential in rates (J.S. 47a).

The district court found that there were significant general considerations in favor of maintaining the rate group and that the Commission's findings with respect to the Washington Street Market were supported by the record (J.S. 4a–5a). The court observed that the Commission was called upon to resolve "a conflict between the legitimate concern of the carriers, claiming urgent need to reduce losses, and the public interest in rate parity throughout the metro-

politan area," and it held that "the Commission properly considered whether the carriers' need for more revenue could be met by means other than breaking the rate group" (J.S. 5a–6a). The court found no basis in the record for challenging the Commission's findings that alternative methods of cost recovery were feasible (J.S. 6a–7a), and it sustained the Commission's finding that the rate differential violated Section 3(1) of the Interstate Commerce Act (J.S. 8a).

ARGUMENT

The decision of the court below was correct, and this appeal presents no question warranting plenary consideration by this Court.

1. The district court properly held that it was the Commission's responsibility to balance competitive and other considerations against the cost differential in determining whether appellants were justified in splitting the metropolitan rate group. It is well-settled that the practice of establishing group rates requires an accommodation between conflicting public and carrier needs, and that cost factors are not necessarily controlling. In *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, this Court held that in grouping stations and fixing rate differentials between station groups, the Commission could consider the desirability of maintaining competitive opportunity among shippers so long as it also took account of differing transportation conditions. See 335 U.S. at 586–587, 592. The fact that the prejudice was not felt by individual shippers (as in *Ayrshire*) but by

the New York City community did not affect its validity as a factor for the Commission's consideration. This Court has held that Congress intended "to make regions, districts and territories, as well as shippers, the beneficiaries of its anti-discrimination policy expressed in Section 3(1)". *New York* v. *United States,* 331 U.S. 284, 308 (1947). There is, therefore, no merit to appellants' contention that the Commission could find undue prejudice only if there was substantial similarity of transportation conditions (*i.e.,* costs) among the stations in the metropolitan group.

2. The remaining arguments made by appellants concern the validity of the cost findings in this proceeding. These contentions have no significance beyond the facts of this case, and are, in any event, unsound.

a. Appellants claim that the Commission disregarded a $12.29 differential in "normal delivery" costs (J.S. 13). Although the Commission did not specifically mention this differential, its decision shows that it was aware of the total cost differential at the Manhattan piers, and it concluded that this amount was insufficient to outweigh the factors favoring the grouping of the New Jersey and New York stations. The district court also did not specifically advert to this differential, which amounted to only about 3 percent of the total long-haul rate. We submit that the general considerations relied upon by the district court to sustain the Commission's order are not affected by evidence of an added small cost of this sort.

b. Appellants also argue that the proper cost factors, namely the costs of the projected service to Hunt's Point, the new location of the old Washington Street Market, were not considered by the Commission (J.S. 16–17). There is no merit to this contention because the question before the Commission was whether the rate differential then in effect was prejudicial to New York City. We do not read the Commission's order as precluding appellants from filing new rates for long hauls to Hunt's Point when service to that location begins on a regular basis. The lawfulness of those rates will present a separate question not decided here, and appellants may then introduce cost data relevant to that service.

c. Appellants finally attack the apportionment of "station costs" under the misapprehension that the purpose of such apportionment was to ascertain "the cost of making team track delivery" in New York (J.S. 20) so as to know the station costs at the site of the new produce market (J.S. 22). The Commission's purpose, however, was to discover whether a substantial part of the cost differential between the Manhattan piers and New Jersey could be recovered by an accessorial surcharge. From the context of the Commission opinion (J.S. 38a, 46a–47a), it is clear that "extraordinary station costs" reflect those services for which the Commission believed an accessorial surcharge might be imposed and that "normal delivery" costs reflect those services which must be covered by the line-haul rate. For this limited purpose, precise apportionment was unnecessary. All the Commission

sought to show was that a "substantial" amount of the station costs were recoverable, leaving a much smaller unrecovered cost differential to weigh against the factors favoring the group rate. Precision would be necessary only if and when a hearing were held to determine the lawfulness of a filed accessorial surcharge. Appellants are obviously not bound in any later proceeding by the Commission's estimate in this case.

CONCLUSION

For these reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF OPPOSING MOTIONS TO AFFIRM.

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